Court, U.S.
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NO. 82-1528

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

STANTON A. TISDALE,
Petitioner,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Agency/Respondent,
and
OWENS-CORNING FIBERGLAS CO. and AETNA CASUALTY INSURANCE CO.,
Employer-Carrier/Respondents,
and
LOCKHEED SHIPBUILDING & CONSTRUCTION CO. and EMPLOYER'S INSURANCE OF WAUSAU,
Employer-Carrier/Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS OWENS-CORNING FIBERGLAS AND AETNA INSURANCE CO.

LEE, SMART, COOK, MARTIN & PATTERSON
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QUESTIONS PRESENTED

1. Should the finding that petitioner had no disability due to hearing loss prior to April 14, 1977 be reviewed by the Supreme Court?

2. Should the ruling that petitioner was not entitled to a "schedule award" for a concurrent hearing loss in addition to total disability be reviewed by the Supreme Court?

LIST OF PARTIES

The petition correctly sets forth the parties, except that Aetna Casualty & Surety Co. is improperly impleaded as Aetna Casualty Insurance Co.

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I.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The petition correctly sets forth the official and unofficial reports pertinent to this matter.

II.

STATEMENT OF THE CASE

For purposes of this petition, this respondent will accept the statement of the case as set forth in the petition.

III.

SUMMARY OF ARGUMENT

The petitioner has failed to note any misapplication or misapprehension of substantial evidence by the courts below. Moreover, it would offend the wage compensation principles of the Longshoremen and Harbor Workers Compensation Act to award a claimant benefits in excess of the total disability benefits already being received.

IV.

ARGUMENT

A. The Finding That Petitioner Had No Disability Due To Hearing Loss Prior to April 14, 1977 Does Not Merit Review By the Supreme Court.

The factual determination by the Benefits Review Board, as affirmed by the court of appeals majority, that petitioner suffered no "disability" prior to April 14, 1977 does not merit review by the Supreme Court. Section 921(c) of the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) places in the federal courts of appeals the responsibility for determining whether substantial evidence in the record considered as a whole supports the Board's determinations. 33 U.S.C. § 921(c). The Supreme Court should intervene only in the "rare instance" when the substantial evidence standard appears to have been "misapprehended or grossly misapplied" by the court below. American Textile Mfrs.

v. Donovan, 452 U.S. 490, 521, 69 L. Ed. 2d 185, 101 S. Ct. 2478 (1981).

Petitioner has failed to note any misapplication or misapprehension of the substantial evidence test. Since the test was correctly applied below, grounds for granting writ of certiorari are not presented. The Benefits Review Board found:

> Using a test of the date of disability, claimant suffered no disability due to hearing loss until he became totally disabled on April 14, 1977, in part due to problems with his left ear resulting from the fall, i.e., tinnitus, perforated eardrum, and some degree of hearing loss. See Hearing Transcript at 12, C. L. Ex. 2 (Dr. Chan's Letter of June 8, 1977), C. L. Ex. 4.

(Brief of Petitioner, 1-43).

On appeal, the Ninth Circuit affirmed the Board as follows:

> There is substantial evidence to support the Board's finding that Tisdale suffered no disability due to hearing loss until his totally disabling injury on April 4, 1978.

(Brief of Petitioner, A-6).

Petitioner does not directly challenge the Board's finding with respect to the date of disability. Rather, petitioner seeks certiorari because "no substantial basis exists for concluding that Mr. Tisdale's hearing loss occurred on or after his (disabling leg) injury of April 14, 1977 (Brief of Petitioner at 18). The substance of petitioner's argument is that benefits under § 908(c), LHWCA, should run from the date of injury rather than the date of disability.

This issue, which is not clearly articulated in the petition, does not merit review by the Supreme Court for two reasons. First, there is no conflict among the circuit courts of appeals since no circuit court has ever relied on a date of injury test in applying § 908(c). Second, since § 908(c) is plainly couched in terms of disability, a test relying on date of injury is inappropriate. Congress never

meant to equate the terms "disability" and "injury". Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981). Further, courts have consistently distinguished "disability" from "injury" under the Act. Pillsbury v. United Engineering Co., 342 U.S. 179 (1952) (terms "injury" and "disability" cannot be equated for statute of limitations purposes); Aerojet General Shipyards, Inc. v. O'Keefe, 413 F.2d 793 (5th Cir. 1969) ("injury" and "disability" not interchangeable); Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981) ("injury" and "disability" not interchangeable with regard to occupational disease cases).

The use of the date of disability test was proper and does not conflict with the decision of another circuit court. To the extent that a difference of opinion exists as to the proper date for fixing "disability" under § 908(c) it can be expected that inconsistencies will be resolved by the

various courts of appeals and that intervention by this Court is unnecessary.

B. That Petitioner Was Not Entitled To "Schedule" Benefits for a Hearing Loss in Addition to an Award for Permanent Total Disability Does Not Merit Review by the Supreme Court.

The decision by the Board, as affirmed by the court of appeals, was that petitioner had not suffered a disability due to hearing loss prior to April 14, 1977. Since petitioner became totally disabled due to a leg injury on April 4, 1977, the Board ruled that petitioner was not entitled to additional benefits under § 908(c)(13), LHWCA, for hearing loss.

Petitioner maintained below that, even if his partial disability (due to hearing loss) occurred concurrent with his permanent disability (due to leg injury), he was still entitled to compensation for his partial disability. The gist of petitioner's position is that "schedule" awards (33 U.S.C. § 908(c)(1)-(20)) compensate for

loss of function and are "not linked to a worker's loss of wage-earning capacity" (Brief of Petitioner at 15). In short, petitioner claims the "schedule" awards amount to tort recovery which may be had above and beyond compensation for wage loss.

Petitioner seeks certiorari on the basis of an alleged conflict between the court of appeal's decision and language in this Court's opinion in Potomac Electric Power Co. v. Director, Office of Worker's Compensation Programs, 449 U.S. 268, 66 L. Ed. 2d 446, 101 S. Ct. 50 (1980) (hereinafter Pepco). In Pepco, the Court held that a permanently partially disabled employee entitled to compensation under the statutory schedule covered by 33 U.S.C. § 908(c)(1)-(20) of the Act, is not entitled, as an alternative, to a more generous compensation under the provision of 33 U.S.C. § 908(c)(21) of the Act governing

compensation in "all other cases". Pepco, 449 U.S. at 271.

The Court noted that requiring resort to the schedule could produce certain incongruous results.

> Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no actual effect on an employee's capacity to perform a particular job or maintain a prior level of income, compensation in the scheduled amount must be paid.

Petitioner seizes upon the "must be paid" language to suggest that the schedule award benefits represent independent tort benefits not tied to wage loss. However, petitioner fails to recognize that schedule awards are really nothing more than rough approximations of loss of wage-earning capacity which are utilized for administrative and policy reasons.

> The LHWCA represents a compromise between the competing interests of

> disabled laborers and their employers. The use of scheduled fixed benefits as an exclusive remedy in certain cases is consistent with the employee's interests in receiving prompt and certain recovery for their industrial injuries as well as with the employer's interest in having their contingent liabilities identified as precisely and early as possible.

Pepco, 449 U.S. 282 (emphasis added).

Since the Pepco decision indicates that schedule benefits are tied to wage loss, there is no conflict between that decision and the ruling of the court of appeals below. Other aspects of the Pepco decision further illustrate the lack of conflict between it and the majority opinion of the court of appeals. The Court in Pepco noted that:

> Since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant.

Pepco, 429 U.S. at 277, n. 17. See 33 U.S.C. § 908(a). The clear import of the Court's language is that scheduled benefits

are precluded once a permanent total disability is found. Further, in Pepco the Court rejected the idea that the "sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries", noting:

> None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only 2/3 of the actual loss of earnings. It therefore is not accurate to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workman's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers.

Pepco, 429 U.S. at 281-282.

Aside from the alleged conflict with the Pepco decision, there is no other reason for this Court to review the decision below. No conflict exists among the circuit courts of appeal on the issue of concurrent payment of permanent total

disability and schedule benefits. The accepted rule, set forth in Ruppert v. Todd, 239 F.2d 273 (9th Cir. 1956), is that a schedule award cannot coincide with compensation for total disability. The only court of appeals authority advanced by petitioner is Hastings v. Earth Satellite Corp., 628 F.2d 895 (D.C. Cir. 1980), cert. denied, 449 U.S. 905 (1980). That case was adequately distinguished in the court of appeals decision below. To the extent that inconsistencies may arise in the future, it can be expected that they will be resolved by the courts of appeal. Intervention by this Court at this time is not necessary.

V.

STATEMENT REGARDING APPENDIX

For purposes of the petition, this respondent will adopt the appendices set forth in the petition.

DATED this 11th day of April, 1983.

Respectfully submitted,

LEE, SMART, COOK, MARTIN & PATTERSON, P.S., INC.
By: JOHN W. SCHEDLER
Counsel for Respondents Owens-Corning Fiberglas Co. and Aetna Casualty & Surety Co.

APPENDIX A

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES OF RESPONDENTS OWENS-CORNING FIBERGLAS AND AETNA CASUALTY AND SURETY COMPANY

I. AETNA CASUALTY AND SURETY COMPANY

Aetna Casualty and Surety Company is wholly owned by Aetna Life and Casualty Company, a stock holding company.

The following companies are affiliated with Aetna Casualty and Surety Company:

1. Aetna Life Insurance Company;
2. The Standard Fire Insurance Company;
3. Aetna Life Insurance and Annuity Company;
4. SPAN Data Processing Center, Inc.;
5. Automobile Insurance Company of Hartford, Connecticut;
6. Aetna Financial Services, Inc.;
7. Aetna Technical Services, Inc.;
8. Aetna Capital Management, Inc.;
9. Aetna Life Insurance Company of Illinois;
10. Aetna Casualty and Surety Company of Illinois;
11. Aetna Casualty and Surety Company of America;
12. Aetna Diversified Technologies;
13. Aetna Telecommunications Laboratories;
14. Aetna Telecommunications Consultants.

II. OWENS-CORNING FIBERGLAS COMPANY

Owens-Corning Fiberglas Company is the parent corporation of the following:

1. OCF Espana, S.A.;
2. Norsk Glassfiber, A/S;
3. OCF Netherlands B.V.;
4. OCFOGO, Inc.;
5. American Borate Corp.;
6. American Borate Co.;
7. Piedmont Products, Inc.;
8. Electric Smith, Inc.;
9. FSE, Inc.;
10. Fiberglas Fabrication Sales Corp.;
11. ABC Note Corp., Inc.;
12. OCF Deutschland;
13. OCF (U.K.), Ltd.;
14. Bayer Owens-Corning Glasswool;
15. Eurostar, S.A.;
16. Eurostar, G.m.b.h.;
17. Veroc Technology A/S;
18. Scandanavian Glasfiber Aktiebollag;
19. Glasfiber AB;
20. Scandanavian Glasfiber, Ltd.;
21. Dansk-Svensk Glasfiber A/S;
22. Fiberglas Canada, Inc.;
23. V.I.L. Vermiculite, Inc.;
24. Owens-Corning Fiberglas Europe, S.A.;
25. Owens-Corning Fiberglas (Italy), F.r.l.;
26. Owens-Corning Fiberglas France, S.A.;
27. Eric Co.;
28. Matcorp, Inc.
29. Owens-Corning Contracting, Ltd.;
30. Karlcorp;
31. Barbcorp, Inc.;
32. Willcorp, Inc.;
33. Roscorp, Inc.;
34. Owens-Corning Cayman, Ltd.;

35. Owens-Corning Saudi Co.;
36. Arabian Fiberglass Insulation Co.;
37. Vitro-Fibras, S.A.;
38. Fiberglas Colombia, S.A.;
39. Polyarm, S.A.;
40. Polyplaster, S.A.;
41. Asahi Fiber Glass Co., Ltd;
42. Amiantite Fiberglas Industries, Ltd.;
43. OCFIBRAS, Ltd.